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IN THE

Supreme Court of the United States

No. A-335

OCTOBER, 1979 TERM

EVER-READY INCORPORATED AND MARK GILBERT,
Petitioners,

vs.

UNION CARBIDE CORPORATION,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF LOUIS ROBERTSON—PRO BONO PUBLICO with proffered brief attached

(In Support of Petition)

LOUIS ROBERTSON, *Amicus Curiae*
1411 Nashua Circle
Sun City Center, FL 33570

Member of the Bar of this Court

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IN THE
SUPREME COURT OF THE UNITED STATES

Ever-Ready Incorporated and
Mark Gilbert
Petitioners

v. No. A-335

Union Carbide Corporation
Respondent

(CA-7 No.'s 77-1378, 77-2035)

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF LOUIS ROBERTSON - PRO BONO PUBLICO

Louis Robertson, a member of the bar of this court, acting pro se but on behalf of the public, moves this Court to grant leave for the filing of the attached BRIEF AMICUS CURIAE, in support of the petition of Mark Gilbert.

Statement Supporting Motion

This motion is made necessary by the refusal of Union Carbide to give consent for the filing of an amicus curiae brief by the undersigned.

Statement as to Interest

The interest of the undersigned in this case is not a mundane interest. It is the interest of a citizen and lawyer in justice, in proper court standards and conduct, and in keeping the U.S.

judicial system above suspicion. Having long practiced in the 7th circuit, with a high regard for its Court of Appeals, any instance in which that Court fails to merit that regard is personally painful.

This amicus has one unique interest: to help right a wrong toward which he may have contributed. In 1975 he participated with several other lawyers in a pro bono publico offering of a brief in support of Union Carbide's appeal from the District Court decision holding EVEREADY to be invalid as a trademark for batteries. The necessary copies were deposited, but leave to file was then denied. This amicus also authored an article published by the Chicago Daily Law Bull. (Aug. 6,1975) attacking the District Court decision. That article could hardly have escaped the attention of the Court of Appeals judges.

Indeed, the urging of that article that the Court of Appeals "lay to rest its broad language in Morrell" was followed by the Court,* even though the brief of Union Carbide was less bold in its treatment of Morrell. (John Morrell & Co. v. Reliable Packing Co. 295 F2d 167).

This amicus believes that errors of

*Part I B of the 1976 decision 531 F2d 366

the Court of Appeals in 1976 favorable to Union Carbide resulted in part from over-reaction to the preposterousness of the District Court decision it reversed. While this amicus cannot be sure that his 1975 article had any influence, there is at least a possibility that it was a spark that ignited the judicial attitude here called "over-reaction".

The briefs offered on opposite sides of this case by the undersigned are consistent in opposing lack of due process in deciding sua sponte a point not properly before the respective courts and on which the parties had not been given a chance to argue. Also, both attacked parts of a decision deemed by this amicus to be shockingly unjust.

This amicus speaks for no client, knows of no client interest, can have no fee. When he learned, near the end of 1976, that Union Carbide had obtained an injunction he deemed excessive, and realized it was based on a decision against laches rendered without due process, he felt that he must switch his amicus efforts to "even the balance".

Need for this Amicus Curiae Brief

The chief need for this brief is to

aid the Court to see the widespread benefits for the judicial system that can be achieved by Supreme Court action in this case, and to see that the petitioner who will be aided by that publicly-needed action deserves that help.

The petitioner is not a trademark pirate, as the accompanying brief makes clear. He is an honest owner of a small business.

One benefit to the judicial system would be in raising the standard of judicial integrity, especially by making clear that petitions for reconsideration must be judiciously considered; and that "without merit" is likely not to be a sufficient reason for denial.

More specific benefits would lie in disapproval of various aspects of the handling of this case by the Court of Appeals, including:

1. Deciding an unappealed point sua sponte without notice to the parties affording them a chance to argue the point before its decision.

2. Making up its own statement of facts on the basis of which it decides a point not argued, with no submission of that statement to the parties or other safeguard.

3. Deciding on appeal an unappealed, fact-laden question which the lower court had reserved, namely, laches.

4. After these three errors, denying requested modification without giving the petitioner a chance to answer an opposing brief, and without giving its reasons for denial, or correcting clear factual error.

5. When the question of lack of due process was raised, per above, and was supported by amici curiae, failing to vacate the improper decision; and failing to explain why.

6. Failing, without explanation, to rule on appeal from the injunction that the defendant should have been given a period for selling his stock, especially when (a) defendant's good faith had not been questioned and his usage had been upheld by the District Court, (b) there was no evidence of significant confusion in the marketplace, and (c) an ex-official of the plaintiff had admitted that purchasors of defendant's products do not rely on trademarks.

Respectfully submitted.

Louis Robertson

IN THE
SUPREME COURT OF THE UNITED STATES

Ever-Ready Incorporated and
Mark Gilbert
Petitioners

vs.

Union Carbide Corporation
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Bo. A-335

BRIEF AMICUS CURIAE OF LOUIS ROBERTSON
PRO BONO PUBLICO

The sections of the accompanying motion which are entitled "Statement as to Interest" and "Need for this Amicus Curiae Brief" are incorporated herein by reference.

MAIN FACTS PERTINENT TO THIS BRIEF
(Including pertinent case history)

Ever-ready is an inherently desirable trademark used by many besides Union Carbide, in some instances on electrical products.*

*Wide usage can be seen on judicial notice basis from standard reference works such as Thomas Register, assuming search report offered by Gilbert to show 300 users of Ever-ready in various forms is not in evidence.

Gilbert's initial use of "Ever-Ready" has never been challenged. His good faith when he expanded his business and hence his use of "Ever-Ready" has never been challenged. The reasonableness of this good faith is shown by the District Court's holding of non infringement. If the appellate reversal must be accepted as the law of this case, it does not detract from his good faith.

The District Court reserved the question of laches as not needing decision when it had held "EVEREADY" invalid and not infringed.

The Court of Appeals reversed the District Court's holdings on validity and infringement. Union Carbide, as appellant, had not sought a ruling on laches. Nevertheless, the Court of Appeals decided the laches question without notice to the parties that that question was being considered and should be argued, and without explaining why it did not remand this reserved question to the District Court. It based its determination against laches on a fact statement mysteriously supplied within the court, having no resemblance to any fact statement furnished

by the parties. This fact statement was ridiculously in error. When, on petition, Gilbert's attorney pointed out the error, Union Carbide, while not claiming real accuracy, disguised the extent of error by a "red herring" technique of asserting some error in the Gilbert statement. Without waiting for a reply by Gilbert, the Court denied the petition.

The Court's error was crucial, in asserting that the defendant's acts involved in the litigation had begun in the year of the start of the suit. That this was a gross error has never been denied by Union Carbide.* The above-mentioned "red herring" may have kept the Court from seeing the error while it could still have been corrected with minimal embarrassment.

In addition to reliance on the "red herring", Union Carbide's opposition to the 1976 Gilbert petition also asserted that Laches would be immaterial anyway, because there should still be an injunction to protect purchasers. Later, before the District Court in the course of a trial on Gilbert's antitrust defense, an ex-official of Union Carbide testified that in buying light bulbs [the low-voltage

*Per previous paragraph U.C. belittled error.

bulbs of this suit] purchasers do not rely on trademarks.* [They match the type of bulb to be replaced, picking up whatever line of bulbs found in the store entered.] There has been no indication that the Court of Appeals has weighed this admission.

There has been no indication that the Court of Appeals has considered whether it was proper, in the good-faith circumstances of this case, and in view of the testimony just mentioned, to virtually put Gilbert out of business by an injunction that did not allow a period in which he could dispose of his stock.

There has been no indication that the Court recognized that Gilbert's products and Union Carbide's are not competing in the marketplace. The trade recognizes two lines, one sold where 110v. devices are sold, the other where batteries energize the bulbs. (infra, B-7). Gilbert sells in the former. Union Carbide has discontinued packaging for that line.**

*Oct. 13, 1976 transcript, p. 78. This admission came out as an escape from efforts of Gilbert to show a "nexus" between acts he was charging to be anti-trust and the trademark EVEREADY on bulbs.

**Un. Carb. main brief, first appeal, p.8.

The Court of Appeals has never even attempted an explanation of why its procedure in denying laches was not lacking in due process and in essential fairness. Nor has Union Carbide attempted any cognizable explanation of this in its briefs to the Court. It has, instead, used the "red herring" technique of attacking as "irresponsible" statements that it had not denied lack of due process, and irrelevantly belittling an outside action by Gilbert.

Union Carbide has attempted to justify the laches determination on the ground that because "plaintiff has never sought damages ... the laches defense was inapplicable as a matter of law". However, that basis has never been expressed by the court, [and would not prevent considering laches on the question of whether the injunction should permit disposal of stock by defendant who has acted in good faith. The subsequent admission mentioned above would also clearly permit the consideration of laches as to whether <u>any</u> injunction should issue. <u>Denying</u> laches gave the District Court on remand far less freedom than would have a <u>ruling of law</u> that laches, though present, would not be an absolute bar to injunction, if found to be

needed to protect purchasers.]

As to defendant's lamps (i.e. bulb-holding desk lamps, etc.*) there is not believed to have been any evidence of actual confusion in the marketplace. Union Carbide's complaint in this suit does not request any relief regarding them.**Union Carbide must have known of them for years because of advertising and because it used Gilbert as a distributor. The sole basis for finding infringement by Ever-Ready on lamps is believed to have been the survey.

The survey questions were of a nature to lead to the answers Union Carbide desired, in view of the fame of EVEREADY batteries. There was no "control" such as scientists would use. [Here such a control would have been to ask the same questions with respect to neutral products bearing the name Ever-Ready, products of defendant or others as to which Union Carbide had no complaint. Then the surveys on lamps and lamp bulbs would clearly be significant only to the extent that

*To distinguish from the sometimes confusing use of "lamps" for lamp bulbs. In this paper "lamps" is never used for bulbs.
**The word "lamps" appears in the requests only in the phrase "bulbs for ...lamps".

incriminating answers were received with substantially more frequency than with the "control". It may be amusing to contemplate the possibility that the "lamp" survey, when ordered, was to be the "control", Union Carbide deciding later to accuse the lamps.]

The term "miniature lamp" has caused much confusion. In the trade, it is used for lamps to be powered by batteries, not for lamps of the same size to be powered from household power lines, usually through a transformer. (Orig. App., p. 80). The trade thus recognizes two lines: one in which Union Carbide sells; the other in which Gilbert sells. "Miniature" is avoided in this paper, except for this note.

ARGUMENT OR DISCUSSION

This brief does not speak against the raising of points sua sponte by courts. It can be a great aid toward justice, when it relates to a point properly before a court, and the parties are given a chance to argue the point before decision by the court. Neither of these requirements were met here, when the Court of Appeals decided against laches.

The court lacked appellate jurisdic-

tion over the question, because it had not been appealed after being reserved by the District Court. Even notice to the parties by the Court would not have given the Court jurisdiction. The appealed questions were the holdings of invalidity and noninfringement. The Court's opinion had already decided these two questions before taking up laches under a separate heading. The court may have seen that that question was not appealed, but amazingly treated this as a waiver by defendant rather than as precluding jurisdiction. The mood of the Court, called "over-reaction" in the accompanying motion, was so strong that apparently it never occurred to the Court that the defendant could not be waiving the laches defense by not appealing, because there was no decision against laches from which he could have appealed.

Even if the Court had had jurisdiction, the procedure would have been lacking in due process, and intolerably unfair.

Neither party had argued the question of laches. It was not in either party's statement of issues. Union Carbide's brief expressly disclaimed discussing laches.*

*Main brief, first appeal, p.4.

Nevertheless, the Court did not call for arguments, when it decided, sua sponte, to take up laches.

The Court did not derive in a permissible manner the statement of facts on the basis of which it decided laches. No paper filed gave any foundation for it. Even Union Carbide's statement of facts mentioned defendants' use of Ever-Ready "in recent years" and specifically mentioned 1969 for one of the uses.* (Brief, p. 9). Yet the Court's mysteriously-derived statement said first use was in 1971, the year suit was filed.

Only by such a gross mis-statement could the court possibly have felt that laches was so clearly lacking as to excuse the proper formalities with respect to this issue. Perhaps such gross mistakes are so easily and innocently made as to be no disgrace.

While such a gross mistake remains uncorrected after request, it becomes a disgrace to the Court committing it and to the entire judicial system, especially when compounded by the other equally gross faults in the treatment of laches by the Court, as pointed out above. If this Court now puts an end to this disgrace, the leg-

*As to earlier uses, see note on p. 15

al system and the country will owe a debt of gratitude to the Gilbert persistence that made the belated resumption of integrity possible.

Widespread Public Benefit

It is rare that one case gives this Court a chance to correct as many bad judicial practices as does this case. Surely the CCA 7 would not have been guilty of these bad practices if it was already sufficiently well known that they were intolerable.

For example, although it seems as clear as could be (on reflection) that a court should never decide a point without having arguments from the parties, this was apparently not evident to the CA-7. This amicus knows of no decisions holding this to be an impropriety or lacking in due process. If Union Carbide wants to argue that it already is so well established as not to need annunciation now by this Court, let Union Carbide cite the decisions.

Rulings by this court are apparently likewise needed on each of the 6 points listed at the end of the foregoing motion, and also on the fundamental question of whether there is jurisdiction over an un-

appealed question. If Union Carbide now contends that even with all these faults, a 1976 decision can not be corrected this late, the suit still pending, then this Court's annunciation on this point is also needed.

These points of public importance justify this Court's time by any standards. But a proposal below may spare the Court from having to spend any time after it grants the petition.

Too Much Injustice Goes Uncorrected

This amicus knows no reason to assume that among the many cases this Court must refuse to accept for lack of sufficient public interest, though recognizing that the decision below might be wrong, injustice is any less frequent than in the public interest cases. This indicates a vast number of unjust decisions below that never get corrected.

This not only offends the American concept of justice for all, but it lowers the public confidence in the judicial system. It is very unfortunate that this court must seem less concerned when an honest business man is virtually put out of his life's business than with a convicted felon whose claim for relief seems

to the public to be a silly technicality.

Suggestion for Time Saving

Although this amicus believes that this case is one deserving the Court's attention through oral hearing if necessary, it is also one where the error is so clear that it invites correction without oral hearing, even if new procedure must be devised. Devising time-saving alternatives could enable this Court to correct far more injustice than it now does. Greater fear of such correction might in turn lead lower courts to be more just themselves.

Calling for submission on briefs would save the Court from oral hearings. However, it would not eliminate further conference time, etc.

This amicus suggests that in cases where the respondent does not have a better justification for the decision below than has so far been expressed in this case, a writ in the nature of mandamus should immediately be issued. In case this can not be done until rules are revised, the amicus suggests an alternative that seems clearly proper under the present rules. The alternative is perhaps best explained by an example; and

the present case makes a good example. This Court could issue a decision much as follows:

> "Petition granted, writ deferred. The response to the petition gives the Court no doubt that the 1976 ruling of the Seventh Circuit Court of Appeals denying laches should be vacated, also subsequent actions based thereon, because:
>
> (1) The Court lacked jurisdiction over laches.
>
> (2) The court should have let the District Court marshal the facts and make initial determinations thereon.
>
> (3) The procedures followed lacked due process and fairness.
>
> (4) The Court was in error in holding waiver by defendant in not urging laches on appeal when that question had been reserved by the District Court.
>
> (5) The Court-stated facts were crucially in error.
>
> (6) On petition for rehearing, the Court did not give the defendant a chance to reply to the opposition; and made no change in its laches ruling, and gave no explanation, even though the opposition did not deny error in the Court's facts.
>
> (7) The Court failed to reevaluate after an ex-official of plaintiff admitted that purchasers replacing small bulbs do not rely on trademarks.
>
> "The clerk shall communicate this decision to the Court of Appeals, and shall issue the writ after two months if informed that the Court of Appeals has not vacated its ruling in accord herewith. By this decision the Court intends to spare itself and the parties from further time on certiorari."

The amicus recognizes that a simple writ giving the Court of Appeals directives along the lines of the above example would be more sensible, if within the present Court practice. The amicus regrets having had so little chance to become familiar with this Court's practice in the many years he has been a member of the its bar. At present he is not even well situated for legal research. The instinct to fight for justice remains, however.

Although the amicus has stated facts which cast doubt on the correctness of holding non-infringement, he does not urge this Court at this stage to disturb that holding. It is, rather, so that the Court can see that the situation is one to which laches can reasonably be applied. Although the holding of infringement is preposterous as to 110 volt plug-in lamps, the laches are most clearly applicable there. As to bulbs, the most fair result might be that the District Court require Gilbert, if he uses the "Ever-Ready" mark after disposal of present stocks, to include on the

packages a suitable disclaimer of any connection with Union Carbide.

Respectfully submitted,

Louis Robertson
Amicus curiae, pro bono publico

1411 Nashua Circle
Sun City Center, FL 33570

Note referred to on page B-9
The amicus has not had access to a set of official exhibits, and can not reliably inform the Court of the full extent of Gilbert's uses of "Ever-Ready" in earlier years. Union Carbide's 1976 answer on petition for rehearing did not deny use on desk lamps as early as 1945 but said there was no evidence of continuous use thereafter. As to bulbs, the amicus has a packaging card of defendants bearing "Ever-Ready" and a "1967" copyright notice. If not in the record, or if there are gaps in proof of continuity, the District Court could reopen evidence, if justice so requires. References herein, throughout, to "Gilbert" may be taken as including his corporate alter-ego using the name Ever-Ready.

LOUIS ROBERTSON
PATENT SOLICITATION

January 28, 1980

1411 NASHUA CIRCLE - SUN CITY CENTER, FL. 33570
TELEPHONE (813) 634-6105

The Clerk of the Court
United States Supreme Court
Washington, D. C.

Re: Mark Gilbert v. Union Carbide 79-1057

Dear Sir:

I was quite unhappy with the quality of printing of some of the pages in my recent Amicus submission to the Court in the above case. I am taking the liberty of having another set transmitted to you, and hope that you can substitute them. If it is best that the Court require a new and better-printed set, please attend to it -- and you will have them with this letter.

At the time of writing this letter I have not seen the new set, but my instructions are that any new typing is to be identical with the original, except for being incapable of poor reproduction.

The submission is entitled MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF LOUIS ROBERTSON - PRO BONO PUBLICO with proffered brief attached. It bore the previous number A-335. If my instructions to keep the printing identical result in this number being retained, I trust you will mark the correction.

If nothing else is practical, you may treat the set now submitted as extra copies, to be distributed or given out in your discretion.

Respectfully yours,

Louis Robertson

Louis Robertson, Amicus Curiae

cc John H. Morrison
Kirkland & Ellis
200 E. Randolph Drive
Chicago, IL 60601

Counsel for Union Carbide,
with 3 copies as herewith.

Copies to all served with original brief.

Also to Circuit Judges: Richard D. Cudahy, Latham Castle, Win J. Knoch